90-1499

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether state prison officials are entitled to the dissolution of a nine-year old remedial decree governing prison conditions for condemned inmates under the standards recently announced in *Oklahoma City Public Schools [Etc.] v. Dowell*, __U.S.__, 111 S.Ct. 630 (1991), for dissolving a school desegregation remedial decree?

II. Whether the Eleventh Amendment to the Constitution of the United States should bar the enforcement of a state prison conditions remedial decree that does not spring from, address or relate to a violation of federal law?

III. Whether the deference due prison officials on questions of prison operations and security should require modification of a prison conditions remedial decree as proposed by state prison officials, where the proposed modifications comport with constitutional requirements?

IV. Whether district court orders that require the parties to negotiate a settlement or which interpret a remedial decree to apply to certain prison facilities and direct a special master to investigate compliance constitute appealable orders, such that failure to appeal precludes appellate review?

LIST OF PARTIES

The parties to the proceedings below were petitioners, James Rowland, the Director of the California Department of Corrections (former Director, Jiro Enomoto), and Daniel Vasquez, the Warden of San Quentin State Prison (former Warden, George Sumner). Respondents here and below are male inmates condemned to death under California law and housed in security housing facilities at San Quentin. The named inmates, who sued on behalf of themselves and all others similarly situated, are Maurice S. Thompson, Charles A. Green, John Gzikowski, Keith D. Williams, Ronald E. Lanphear, Chol Soo Lee and Andrew E. Robertson.

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Petitioners, James Rowland, Director of the California Department of Corrections, and Daniel Vasquez, Warden of San Quentin State Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on October 4, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 915 F.2d 1383, and is reproduced in the separate appendix. App. at 1-20. Four unpublished orders of the district court from which petitioners appealed are also reproduced: Order of October 5, 1989, (including the Fourth Report of the Monitor), App. at 31-105; Order of December 18, 1986, App. at 106-107; Order of January 17, 1987, App. at 108-118; and, Order(s) of March 25, 1985, App. at 119-126.

JURISDICTION

On October 27, 1989, a motions panel of the court of appeals granted petitioners' emergency application for a stay pending appeal. App. at 24. The court of appeals entered judgment on October 4, 1990, and denied rehearing and suggestion for rehearing *en banc* on January 8, 1991. App. at 23. This petition is timely filed within ninety days. The stay remains in effect by order of the court of appeals pursuant to Federal Rules of Appellate Procedure 41. App. at 27 and 30.

This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).[1/]

STATUTES INVOLVED

The statutes involved are 42 U.S.C. §1983 and 28

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1. On February 19, 1991, this Court granted Certiorari in two cases which present questions substantially related to or fairly included within the instant Questions I, II and III, in *Vose v. Inmates of Suffolk County Jail*, No. 90-1004, and *Rufo v. Inmates of Suffolk County Jail*, No. 90-954.

U.S.C. §§ 1291 and 1292(a)(1). They are reproduced in the appendix. App. at 127-128.

STATEMENT OF THE CASE

This case concerns whether prison officials must continue to operate California's condemned row for men in San Quentin State Prison according to the detailed provisions of a federal court consent decree entered in October, 1980. When entered, the decree addressed conditions in a unique 68-cell facility where all the condemned inmates were then housed. App. at 54. At the time there were 44 condemned row inmates, seven of whom were named plaintiffs. There were no findings of liability and the decree recited that its entry was not an admission of a violation of law. Moreover, the decree provided that the case was to be dismissed in its entirety at the end of one year if the petitioners complied with the decree. Even though full compliance in the original facility was achieved by no later than April 1982, because the condemned population had by then outgrown the row, rather than dismiss the case as the decree required, in June 1982, the district court ordered the parties to negotiate modifications to the decree to encompass another, structurally different, facility. *Thompson v. Enomoto,* 542 F. Supp. 768, 770 (N.D. Cal. 1982). No inmate class, however, had been certified.

From time to time over the next eight years, petitioners and the inmates tried without success to negotiate a new decree governing conditions in the facilities which came to house most of the inmates, which today number nearly 300. Failure to reach agreement, however, did not mean petitioners disregarded either the decree or their other legal obligations. They continued to comply with the decree in the original unit, a record of compliance virtually unbroken from April 1982, to the present. Compliance with some of the decree's provisions in the other facilities, however, was rendered impossible by

the structural differences between them and the original unit. This chiefly concerned the provision for indoor-out-of-cell recreation time, or "tier-time." The single-tiered original unit ("North Segregation") was laid out in a way that allowed inmates to be released from their cells to mingle on the tier, play ping-pong and table games, and use exercise equipment. The other facilities where the ever-increasing condemned population have been housed – Carson Section and, since 1988, East Block – are five-tier 500-cell units with narrow walkways in front of the cells on the top four tiers and staff offices on the bottom tier. Those facilities are unsuitable for indoor inmate recreation. Petitioners, after due consideration and in their professional judgment, also determined a few other decree provisions to be unnecessary, too burdensome, or potentially dangerous in Carson Section and East Block and excluded them from the condemned row program in those facilities.

Other than the exceptions referred to above, however, petitioners adopted the original decree as the blueprint for the condemned program in Carson Section and East Block. They substituted a generous daily outdoor exercise and recreation program for the tier recreation available only in North Segregation. In addition to the yard exercise equipment, they placed the table games and exercise equipment required to be on the tier in North Segregation, except for ping-pong tables, on the Carson and East Block yards for the inmates' use.

Consequently, the inmates' conditions of confinement over the years more than satisfied Eighth Amendment standards and were substantially equivalent to those required by the decree. The inmates, however, continued to insist they were entitled to the letter of the decree in each facility. In 1983, they filed their first contempt motion to that effect in connection with "Grade A"

inmates housed in a five-tier facility[2/]. Petitioners responded that the decree was not intended to apply to Grade A inmates in facilities other than North Segregation and, because of structural differences, that the letter of the decree could not be enforced in other units. They also submitted to the district court a detailed proposed decree for those facilities which contained most of the features set forth above. They argued in support of the proposed decree that it fully complied with all applicable state and federal laws and asked that it be entered as a modification to the original decree.

The district court denied, in pertinent part, the inmates' contempt motion as well as petitioners' motion to modify. It ordered further negotiations. And it ordered that North Segregation, because it was the only unit where full compliance was possible, be reserved for those inmates classified Grade A and who, consequently, were allowed tier-time. This order remains in effect and has had the collateral consequence of preventing petitioners from using the most secure unit in San Quentin and one of the most secure in the state to house inmates, such as Grade Bs, who pose an even greater security risk than the Grade A condemned.

The inmates filed another contempt motion in 1984, then in 1985 withdrew it in favor of a motion to appoint

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2. "Grade A" is the decree classification for approximately 90 percent of the condemned men; according to the decree and its adaptation in Carson Section and East Block, inmates classified Grade A are entitled to tier-time or daily yard, respectively. Petitioners' motion to modify the decree in regard to Grade B inmates, who are not entitled to tier-time, was granted and affirmed on cross-appeal. *Thompson v. Enomoto,* App. at 20. The June 1982, order to negotiate was directed at Grade B conditions in the Adjustment Center, which is neither a Grade A nor a five-tier facility. The statement to the contrary in the district court's order, App. at 55, is incorrect. *Thompson v. Enomoto,* 572 F. Supp. at 769-770; *cf., Thompson v. Enomoto,* App. at 6, 16-17.

a special master (the "Monitor") on the grounds that petitioners' continued failure to comply with the decree in Carson Section justified further court intervention. Petitioners again objected that the decree did not apply to Carson Section. When the district court granted the motion, petitioners appealed on the same grounds. The court of appeals dismissed the appeal, holding that the appointment was an unappealable interlocutory order and petitioners could renew their arguments "when the district court decide[d] whether to adopt the Monitor's recommendations" concerning Carson section. *Thompson v. Enomoto,* 815 F.2d 1323, 1327 (9th Cir. 1987).

In 1986, the inmates refiled their contempt motion regarding compliance with the decree in Carson Section. In response, the First Report of the Monitor was submitted to the court. The Monitor concluded that the petitioners were correct that the decree did not apply in Carson Section. The Monitor made no findings concerning decree compliance in that unit[3/] and recommended that the district court adopt his interpretation of the decree's scope. The inmates objected to that portion of the Monitor's Report. In December 1986, the district court reversed the Monitor, ruled the decree should be interpreted to apply to "segregated condemned inmates...wherever housed" at San Quentin, and remanded the Carson Section contempt motion for further investigation. App. at 106-107.

On motion for reconsideration decided January 17, 1987, the court declined to vacate its reversal of the Monitor's conclusion about the scope of the decree. App. at 113-116. The court purported only to interpret rather than modify the decree, expressly ruled that its interpretation was only "interlocutory," App. at 112, did

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3. The court of appeals' implication to the contrary is incorrect. *Thompson v. Enomoto,* App. at 9.

not hold petitioners in contempt, and remanded the inmates' Carson Section contempt motion for further investigation. In view of the court of appeals' earlier admonition to await action on the Monitor's recommendations before again appealing, petitioners did not appeal the court's ruling and order.

Thereafter, three more Monitor's Reports were issued. The Second Report, issued in July 1987, made no findings concerning compliance outside North Segregation and was never entered as an order. The Third Report was issued in November, 1988. It construed the court's January 1987, memorandum and order as in effect having certified a class of all condemned inmates at San Quentin and reported the results of the Monitor's investigation of compliance with the decree in East Block. The North Segregation inmates had been moved to East Block due to the renovation of North Block plumbing, heating and ventilation, and the cells themselves, as ordered in other litigation to which condemned inmates were not parties. The renovation of East Block had by then been substantially completed. The renovation was not required by the decree.

The Third Report described some variations from the letter of the decree. Most which affected Grade A inmates were the result of having substituted the 4-1/4 hour per day, seven day per week yard program for the 6 hour daily indoor tier program. In regard to each variation from the decree, the Monitor recommended the court order petitioners to show cause why they should not be held in contempt. The court so ordered.

A. **The District Court Order**

Petitioners responded by moving to vacate the decree in its entirety, or in the alternative, to adopt the thoroughly constitutional East Block condemned program as the decree for all inmates for one year, then to dissolve it as the parties had originally agreed. Petitioners argued that the inmates' conditions of confinement fully

comported with constitutional requirements and had for many years. There is therefore no need for the decree at all, much less for strict adherence to its provisions. Moreover, the cases decided since its entry had established that virtually the entire decree -- and every provision alleged not to have been adhered to in East Block -- unambiguously exceeded constitutional minima and therefore was not an enforceable remedy absent continued Eighth Amendment violations or intransigence in curing past violations. Petitioners relied upon traditional principles of equitable jurisdiction, the deference due their expertise in prison administration and, in later briefing, the Eleventh Amendment. Petitioners also contended it was impossible to comply with every decree provision in East Block and that the East Block condemned program was in substantial compliance with the decree.

The inmates replied that petitioners had struck a bargain to settle a federal court action and should be required to adhere to its letter, absent "a grievous wrong evoked by new and unforeseen conditions," *United States* v. *Swift & Co,* 286 U.S. 106, 119 (1932). They did not dispute that the inmates' conditions of confinement were and had been constitutional. Rather, they contended that the decree remained valid as a compromise of their *state* law claims, as well as their claim to a Fourteenth Amendment substantive due process or equal protection right not to be segregated on the basis of their capital sentence alone. They asked that the East Block program be made over in the decree's image and that the court retain jurisdiction to ensure that petitioners continued to comply.

After a hearing on the order to show cause and petitioners' motions, the Monitor issued his proposed Fourth Report. In it the Monitor purported to "reconcile" *U.S. v. Swift & Co.,* with later cases that have recognized a more flexible standard for decree modification in, at least, institutional reform cases. To do so, the Monitor

adopted a "standard" for modification that is not susceptible of any definition.[4]

The proposed Report (incorporated in pertinent part into the district court order on appeal) recommended, that (1) petitioners' substitution in East Block of the daily yard program for the North Segregation indoor tier program be allowed, but that even more yard time, from more than four hours each day to more than five hours, be added, App. at 67, and that petitioners be required to provide ping-pong tables, App. at 77, and serve lunch on the yards, App. at 81; (2) the existing yard showers be plumbed with hot water, App. at 80; (3) a roof be constructed over part of the Grade A East Block yards, App. at 71; (4) a storage shelf be installed in each of the more than 200 cells occupied by Grade A inmates, App. at 83; (5) despite having access to hundreds of other items, inmates be allowed to purchase from the canteen toothpicks, dental floss, baby oil, shoe polish, plastic spoons and dairy creamer even though, in petitioners' opinion, these items pose a security threat in a SHU (security housing unit) environment, App. at 88; and, (6) petitioners allow inmates to use the off-the-row SHU law library, App. at 101, and obey noise standards, App. at 104, ordered in a case concerning non-condemned SHU inmates housed in five-tier units, including East Block.

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4. "[S]tripped of excess verbiage, the decision in each of the seminal cases ultimately turned upon the court's judgment as to whether, under all of the specific 'facts and circumstances' present, the lower court acted within its equitable discretion in granting or denying modification to the party so moving. [Citations omitted.] This standard should be used here...." App. at 51. The "excess verbiage," however, is an attempt at articulating limits on the exercise of the courts' discretion, "since discretionary action almost by definition means an action...that is not subject to appellate reversal." Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 645 (1982).

See, Toussaint v. McCarthy, 597 F.Supp. 1388 (N.D.Cal 1984), *affd. in part & revsd in part, Toussaint v. McCarthy,* 801 F.2d 1080 (9th Cir. 1986).

The Report recommended no change in the North Segregation condemned program and recommended denial of petitioners' motion to be allowed to house all Grade A inmates in East Block, App. at 62, in effect modifying the decree to create two separate condemned row programs. It also recommended petitioners be cited for contempt for disobeying the yard roof, shelving and hot yard shower decree provisions in East Block.

Petitioners not only objected to the recommendations on the grounds that none of them were required under the Constitution or by past constitutional violations, they had also submitted extensive, largely uncontradicted evidence demonstrating that differences between East Block and North Segregation rendered those recommendations unnecessary, financially burdensome, awkward to implement, wasteful and a security risk. Most of this evidence was ignored, summarily dismissed, or discounted in favor of substituting the Monitor's judgment for that of petitioners.

The Report agreed with petitioners that the decree substantially exceeds applicable Eighth Amendment standards, App. at 58-62, including all the provisions that petitioners were not strictly complying with in East Block. The Report did not identify any unconstitutional conditions. But, concluded the Monitor, that did not mean petitioners were entitled to have the decree vacated.

The Monitor explained that, in his view, the inmates had a "plausible" liberty interest in being housed in the general population at San Quentin, App. at 56, and therefore they could not be segregated other than through procedures which comport with due process. This liberty interest is purportedly derived from the Department of Corrections' administrative segregation regulations. Since that was one of the allegations of the 1979 complaint, the

Monitor concluded the decree should be seen as a compromise of that claim and therefore still a valid remedy for a constitutional violation. App. at 61.

Petitioners timely filed objections to this part of the proposed report on the grounds (1) that the administrative segregation regulations did not apply to condemned inmates, who were segregated as a matter of long-standing policy and sound correctional practice for reasons unique to their situation within the penal system;[5] (2) that even if the regulations did apply to them, their death sentences met the regulations' criteria and they had been afforded all procedural safeguards due them in establishing the substantive predicate for segregation; and, (3) even if the regulations applied to them and the procedures employed to order them segregated were inadequate, the court of appeals had held that a decree which specified conditions of confinement was not an appropriate remedy for a procedural due process violation -- the remedy for the latter is adequate process, not work programs, or exercise schedules, ping-pong tables, shelving, and the like. *Toussaint v. McCarthy,* 801 F.2d at 1106.

The Monitor rejected those contentions without comment and submitted the Fourth Report to the court unchanged in that respect. Petitioners repeated all their objections to the Report in a timely motion and in

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5. This is the practice followed in most states with condemned prisoners. *See, Management of Death Row Inmates,* Ch. V, pp. 1-6, American Correctional Assoc., prepared for National Institute of Justice, U.S. Dept. of Justice (1988). No other federal court has held condemned inmates have a liberty interest in general population housing, despite the prevalence among the states of segregation regulations similar to California's. In Pennsylvania, which has such regulations, *see, Hewitt v. Helms,* 459 U.S. 460 (1983), a trial court dismissed on summary judgment a claim that the condemned could not be housed in segregation solely on the basis of their sentence, a ruling the plaintiffs did not challenge on appeal. *Peterkin v. Jeffes,* 855 F.2d 1021, 1023 (3rd Cir. 1988).

addition they moved the court reconsider its interpretation of the decree to encompass Grade A facilities other than North Segregation.

The district court denied petitioners' motions and, on October 5, 1989, entered the Fourth Report as its order. It reiterated the Monitor's conclusion about the inmates' liberty interest in general population housing without responding any more than had the Monitor to petitioners' disagreements with that conclusion. App. at 35. Petitioners now contend, as they did in the district court and on appeal,[6/] that that conclusion is plainly wrong. It serves only to obscure the fundamental issues of federal court jurisdiction presented by this case.

B. **The Decision of the Court of Appeals**

Petitioners appealed from the October 1989, order, the Monitor's appointment in 1985, and the orders interpreting the decree to apply to condemned inmates "wherever housed" at San Quentin.

In regard to the construction of the decree to apply to condemned inmates "wherever housed," the court of appeals held that the petitioners had waived their right to object to the district court's "modification" of the decree to apply throughout the prison by failing to timely appeal the June 1982, order to negotiate modifications and the January 1987, memorandum order interpreting the decree. *Thompson v. Enomoto,* App. at 17. Another circuit, and another panel of the Ninth Circuit, have held nearly identical orders to be non-appealable.

The court of appeals also held that the "consent decree as interpreted by the [c]ourt presents no Eleventh Amendment problem." *Id.* at 19. The court simply noted that the action was brought against "state officials, not the State, to vindicate constitutional rights under the Eighth

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6. The court of appeals also did not respond to petitioners' arguments on this issue. *See, infra.*

and Fourteenth Amendments[; t]his is not barred by the Eleventh Amendment[,]" citing *Ex Parte Young*, 209 U.S. 123 (1908), and stated that "[w]e are now dealing with a consent decree in an action against state officials to vindicate constitutional rights." *Id.* at 18.

Petitioners' Eleventh Amendment attack on the district court order did not rely on whether the named defendant was the state rather than state officials, any more than had this Court in deciding the Eleventh Amendment question in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The court of appeals did not respond at all to the merits of petitioners' actual Eleventh Amendment argument, one that was extensively briefed by both parties and about which the courts of appeals are in conflict.

The court of appeals also failed to address petitioners' challenge to the denial of their motion to vacate or, at least, to modify the decree in light of the history of compliance in North Segregation, the constitutional conditions of confinement in East Block, and the changed circumstances and intervening clarifications in the law, which together eliminate the need for further enforcement of the decree or the imposition of any additional obligations in East Block. As this Court's intervening decision in *Board of Education Of Oklahoma City Public Schools v. Dowell*, __U.S.__, 111 S.Ct. 630 (1991), makes plain, these are potentially dispositive jurisdictional issues of fundamental importance to every state and local governmental entity currently operating or which will operate in the future subject to a federal court decree.

REASONS FOR GRANTING THE WRIT

The jurisdictional issues presented by this case are important and timely. What must state prison officials do, and for how long, before they are entitled to an order vacating a prospective decree governing conditions of

confinement and ending federal court oversight? Even if continued oversight were justified in a particular case, that should not end the inquiry. Where prison conditions have long since been brought into compliance with the Constitution but changed circumstances, such as an increase in inmate population, render full compliance with the consent decree impracticable, should not a district court accept decree modifications proposed by prison officials which also fully comport with constitutional requirements?

Answers to these questions vary among and within the circuits. The variation is not solely, or even principally, the result of the complexity and consequent variety of the fact patterns presented in the cases. In large part the conflicts result from the differing doctrinal approaches to defining the limits of equity jurisdiction in post-judgment proceedings.[7] As the institutional reform litigation -- especially prison litigation -- begun during the past two decades matures, the questions related to when and how jurisdiction should end have become as critical as those which, when asked at the beginning of the structural reform era, defined when and how the federal judiciary should seek to remedy federal constitutional violations. The conflict in the cases on these questions reflects both their importance and the increasing frequency with which the courts are being asked to address them.

This Court's decision in *Oklahoma City Public Schools [Etc.] v. Dowell*, 111 S.Ct. 630, announced after the court of appeals denied rehearing in this case, addresses the showing to be made on a motion to vacate a school desegregation remedial decree. The underlying rationale in that case, if applied to the instant prison conditions decree, should entitle petitioners to an order

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7. Note, *The Modification of Consent Decrees in Institutional Reform Cases*, 99 Harv. L.R. 1020, 1028 (1986).

vacating the decree and ending the case. That is especially so here, since in addition to the limits on equity jurisdiction emphasized in *Dowell*, the jurisdictional limits inherent in the states' Eleventh Amendment immunity apply.

The decisions below also conflict with this Court's oft repeated direction that when considering either liability or remedies, trial courts should defer where possible to the professional judgment of state prison administrators. This principle should apply no less to rulings on motions to modify remedial decrees. Where prison officials propose to modify a decree rendered unenforceable by changed circumstances, modification should be liberally granted as proposed if the modifications comport with constitutional requirements, especially where the conditions are shown to be constitutional, to have remained so for years, and where there is no evidence of official intransigence in curing past violations.

The Writ should be granted on these questions to examine how *Dowell* is to be applied in prison conditions litigation, and to address the split in the circuits concerning the application to post-judgment proceedings of both the Eleventh Amendment and other limits on equity jurisdiction. The Writ should also be granted to protect the integrity of the consent decree process. State and local correctional officials have become wary in recent years of entering into consent decrees in the face of uncertain fiscal, penal and legal circumstances for fear they will be forced to forever comply with a decree that proves impractical or excessive. The lack of a coherent standard for either decree dissolution or modification is one source of their concern.[8/] This concern may contribute

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8. Correctional Law Reporter, Vol. I, No. 5, at 73: "While settling these complicated lawsuits...has the attraction of avoiding extended and expensive litigation, many administrators have come to curse the consent decree signed years ago, which still dictates

to a reluctance to participate in the efficient resolution of new cases by consent.

This Court, in the exercise of its supervisory authority over the administration of justice, should also examine and reject the district court's patently erroneous conclusion, unexamined by the court of appeals, that somehow California prison regulations having nothing to do with condemned inmates nevertheless bestow on them a "liberty interest" in being housed with the San Quentin general population. *But the Court need not do so to reach the important jurisdictional questions.* Even if the courts below were correct, the decree is still an entirely inappropriate remedy in a procedural due process case.

Finally, litigants in compiex litigation should not be confronted with conflicting standards governing whether a post-judgment order is appealable. The court of appeals' conclusion that petitioners waived their objection to expansion of the decree into other Grade A facilities not only fails to explain how that waiver could include objections to modifications not even proposed until years later, it directly conflicts with at least one other court of appeals' decision on when similar orders in post-judgment proceedings are appealable.

I. THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN *OKLAHOMA CITY PUBLIC SCHOOLS V. DOWELL*, BECAUSE THE INMATES' CONDITIONS OF CONFINEMENT ARE CONSTITUTIONAL AND WILL REMAIN SO.

After the court of appeals denied rehearing, this Court construed its precedents concerning consent decree modification in connection with a school board's request to vacate a desegregation decree. *Oklahoma City Public*

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how a facility must be operated."

Schools v. Dowell, 111 S.Ct 630. The Court held that "where the purposes of the desegregation litigation had been fully achieved[, n]o additional showing of 'grievous wrong evoked by new and unforeseen conditions' is required of the School Board" to entitle it to an order vacating the decree. *Id.* at 637, quoting *United States v. Swift & Co.,* 286 U.S. at 119. To demonstrate that "the purposes of the desegregation litigation had been fully achieved," a school board must show that the "School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the School Board would return to its former ways." *Id.* at 636-637.

Equally compelling "considerations based on the allocation of powers in our federal system," *id.,* apply here in connection with petitioners' motion to vacate the condemned row decree. State prisons, no less than school systems, were not meant to be subject to federal court decrees "in perpetuity." *Id.* at 638. Like education policy, the "inordinately difficult undertaking...[of prison administration is] peculiarly within the province of the legislative and executive branches of government.... [S]eparation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley,* 482 U.S. 78, 85 (1987). Unlike school boards, however, whose violation of the Constitution by definition requires a lengthy period of oversight to assure "the vestiges of *de jure* segregation had been eliminated...," *Dowell, at 638,* prison officials are ordinarily required only to end the identified constitutional violation. Absent intransigence in moving to bring about constitutional alignment, *see, Hutto v. Finney,* 437 U.S. 678, 687 and n. 9 (1978), a reasonable period of oversight in prison cases, therefore, should if anything be on average much shorter than in a desegregation case. *Cf. accord, id.* at 711-714, (Rehnquist, J., *dissenting*).

In 1979, when the complaint was filed in this action,

California had been incarcerating condemned inmates under a reenacted death penalty law for only two years. After the decree's entry, they moved quickly to comply. When their motion to vacate was denied, petitioners had complied with and exceeded the terms of the decree for nearly nine years in the only unit where literal compliance was possible. In the other units petitioners adapted the decree as best they could, substituting substantially equivalent privileges where possible. Moreover, as the result of court orders in other cases to renovate North and East Blocks, the condemned inmates benefitted from an upgrade in the physical facilities that was not required by the decree. Consequently, since the decree's entry there has not been even one *allegation* of a constitutional violation related to the inmates' conditions of confinement.

As measured by the cases decided since its entry the goal of the decree here -- constitutional prison conditions -- has certainly been achieved. In 1981, this Court held "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society....[T]he Constitution does not mandate comfortable prisons...." *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981). The Third Circuit has since applied those standards in a comprehensive conditions of confinement case brought by Pennsylvania's condemned inmates. *Peterkin v. Jeffes,* 855 F.2d 1021 (3rd Cir. 1988). The *Peterkin* trial court had examined virtually every aspect of the state's treatment of condemned prisoners, concluding each challenged condition of confinement was constitutional under *Rhodes*. *Peterkin v. Jeffes,* 661 F.Supp 895 (E.D. Pa. 1987). The Third Circuit, in pertinent part, affirmed. *Peterkin v. Jeffes,* 855 F.2d at 1022. The Ninth Circuit also twice spoke to the conditions of confinement for non-condemned San Quentin segregation inmates, in *Wright v.*

Rushen, 642 F.2d 1129 (9th Cir. 1981), and *Toussaint v. McCarthy*, 801 F.2d 1080.

The conditions of confinement for California's condemned inmates meet and exceed the constitutional standard established in *Rhodes*, as illustrated particularly in both *Peterkin* and *Toussaint*.[9] This Court has also held there is no Fourteenth Amendment substantive due process right not to be segregated from the general population for administrative reasons. *Hewitt v. Helms*, 459 U.S. 460, 466-467 (1983). And *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), barred federal courts from enforcing state law against state officials. These post-entry developments in the law have severed entirely the relationship between the decree and the federal and state law claims advanced in the underlying complaint. [10]

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9. For instance, the 29 3/4 hours of outdoor exercise allowed the Grade A condemned inmates in East Block each week is more than twice the 14 hours allowed Pennsylvania's condemned row inmates and the 10 hours ordered in *Toussaint*. In Pennsylvania, moreover, exercise is taken alone or with one other inmate in small, uncovered, narrow yards devoid of any exercise or recreational equipment. The yards lack even a drinking fountain. In contrast, California inmates exercise together on large yards with plentiful and varied exercise and recreational equipment and a cold water shower, none of which is required by the Constitution.

10. It is on this point that this case is most clearly distinguishable from two decisions relied on by the district court, *Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988) and *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir., 1989). In *Badgley*, the jail conditions were and remained unconstitutionally crowded, conditions which would only have been exacerbated by the disputed modification. 853 F.2d at 53-54. In *Kozlowski*, the requested modifications would have changed provisions "deeply rooted in federal law," 871 F.2d at 243, which "fell within the ambit of the pleadings" in a case where liability had been established at trial. *Id.* at 245. Here, it is unreasonable to conclude that vacating the decree could impede "the ability to obtain

Under the circumstances, nearly nine years -- far longer than the parties had initially agreed -- should have been more than enough time to have "enable[d] the [d]istrict [c]ourt to observe the good faith of [petitioners] in complying with the decree" in North Segregation and the Constitution in the other facilities. *See, Dowell* at 637-638. The district court should therefore have dismissed the case and relieved defendants of any further obligation under the decree. The court, however, decided that the Due Process Clause of the Fourteenth Amendment protects a condemned inmate's right not to be deprived, without due process of law, of a "plausible," App at 56, liberty interest in general population housing and privileges, derived from the Department's administrative segregation regulations. App at 61. From this sole premise, the district court concluded that the decree remains viable as a compromise of a "colorable" federal constitutional right, App. at 35, and should not be vacated. The court of appeals, in apparent reference to that conclusion, held that "as interpreted by the district court," App. at 19, the decree could be enforced.

Petitioners contend that that conclusion is plainly *very* wrong.[11] The district court's superficial treatment of

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the ultimate goal" of the decree. *Id.* at 248. Petitioners' treatment of the condemned fully comports with the law, as it has for years. The "ultimate goal" has long since been achieved.

11. Those regulations have always applied to non-condemned inmates only. *See, Toussaint v. McCarthy*, 801 F.2d at 1097; "[n]othing in [the regulations] purports to limit the Department of Correction's authority to segregate inmates to the circumstances enumerated....." Condemned housing is simply not covered in the regulations. Instead, San Quentin and the Department historically followed a policy of segregating condemned inmates since long before the departmental regulations were first enacted. And the Department has consistently interpreted its segregation regulations as not applying to the condemned. That was the case when this action was both filed and settled, and it remains the case today. Even if the segregation

the question and the court of appeals' unfortunate refusal to articulate a basis for its affirmance argues for this Court to exercise its authority over the administration of justice and either decide the issue or vacate the decision with directions for rehearing.

Even if, however, the inmates' procedural due process claim were valid, it would not follow that petitioners' motion to vacate the decree should have been denied. It is not necessary to reach the "liberty interest" question before examining whether the courts below applied the appropriate standard for decree dissolution in a prison case, or whether, as petitioners contend, the courts improperly enshrined the decree as the law of the case separate from the constitutional values it was meant to enforce.[12/]

In *Dowell,* at 635, this Court rejected the view that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to

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regulations did apply to condemned inmates, however, the regulations are nevertheless fully consistent with the practice of assigning inmates sentenced to death to security housing. The Department has determined that the condemned as a class warrant segregation due to their suicide, escape, and danger potential. The courts below did not even attempt to suggest how, given that policy, any condemned inmate could "reasonably form an objective expectation" that he would be housed in the general population, nor did they explain how the "regulations [are] . . . worded in such a way that an inmate could reasonably expect to enforce them against prison officials," so as to effect his release from segregation. *Kentucky Department of Corrections v. Thompson,* __ U.S. __, 104 L.Ed.2d 506, 518 (1989). The regulations therefore do not create a Fourteenth Amendment liberty interest for condemned inmates. *Id.*

12. The court of appeals avoided discussing guidelines for decree dissolution, but its singular reference to what might justify modification implies a one-way street favoring plaintiffs in institutional reform cases. *Thompson v. Enomoto,* App. at 12.

effectuate." Instead, the Court emphasized that prospective injunctive relief must "'directly address and relate to the constitutional violation itself.'" *Id.* at 637, quoting *Milliken v. Bradley,* 433 U.S. 267, 282 (1977); *and see, System Federation No. 91 Ry. Employees' Dep't. v. Wright,* 364 U.S. 642, 652-653 (1961); "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives," whether or not the rights were created by consent decree since "the court was not acting to enforce a promise but to enforce a statute."

Here, the permissible remedy for a procedural due process violation would be hearings which comport with due process, not the detailed prescription for living conditions and privileges in the decree. That was precisely the holding in *Toussaint,* 801 F.2d at 1106, in reversing an order requiring general population-like work privileges as a remedy for inadequate segregation procedures for non-condemned San Quentin inmates.[13/] Neither the district court nor the court of appeals explained how enforcing any or all of the decree's provisions could be justified in light of the Monitor's express conclusion that the decree -- as was said of the work requirement in *Toussaint* -- "emulates insofar as possible the daily activities available to San Quentin's general population inmates...." App. at 59. If the decree thus protects the inmates' "liberty interest" in freedom from arbitrary segregation, then the decree is no more an appropriate remedy than the

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13. "Requiring prison officials to provide work programs is an inappropriate remedy. The due process clause seeks to prevent denial of life, liberty or property by arbitrary decision. *Hewitt [v. Helms,* 459 U.S. at 476]; *Greenholtz [v. Inmates of the Nebraska [etc.],* 442 U.S. 1, 7 (1979).] The due process clause requires procedure. *See, Mathews v. Eldridge,* 424 U.S. [319, 335 (1976).] The district court's order, however, does not relate to enforcement of procedural protection. The work requirement relates only to conditions of confinement."

Toussaint work requirement.

It is not enough, therefore, to simply identify one claim among many in the complaint that might still justify prospective relief. On a motion to vacate a decree, the court should also examine whether the decree remains enforceable as an appropriate remedy. *Cf., Dowell,* at 637-638. If it does not, either because subsequent case law has determined that the decree does not properly address or relate to the identified claim or because the parties or the court were mistaken in fashioning it, it should be vacated. To do otherwise saddles public officials with continuing obligations that are not found in federal law. Petitioners submit the Court should grant the Writ so as to examine whether the principles at work in *Dowell* and the other cases cited above should prevent this result.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS, AND IN PRINCIPLE WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN*, BECAUSE THE DECREE DOES NOTHING TO ENFORCE FEDERAL LAW.

As state officials, petitioners' discretionary authority to administer San Quentin State Prison is also protected by the Eleventh Amendment. *Cf. Turner v. Safley,* 482 U.S. at 85; "[w]here a state penal system is involved, federal courts have. . .additional reason to accord deference to the appropriate prison authorities. [Citation omitted]."

The Eleventh Amendment bars lawsuits against the states, and against state officials in their official capacity unless a suit seeks prospective relief from a federal law violation. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Ex Parte Young*, 208 U.S. 213; *Edelman v. Jordan*, 415 U.S. 651 (1974). Although the issue in *Pennhurst* was whether federal courts have jurisdiction to enjoin state officials from violating state law, it follows logically that if the Eleventh Amendment bars federal courts from ordering state officials to obey state

law, the Eleventh Amendment also bars federal courts from ordering state officials to obey no legal requirement whatever. Such orders have nothing to do with holding state officials responsible "'to the supreme authority of the United States.'" *Id.* at 102, quoting *Ex parte Young*, 209 U.S. at 160, *and see,* 465 U.S. at 106.

The Eleventh Amendment should therefore bar a federal court's attempt to enforce a remedy that does not in at least some substantial part spring from, address or relate to an identifiable federal constitutional or statutory right. Here, the district court concluded the decree had little to do with enforcing Eighth Amendment standards. And even if the inmates have a liberty interest in not being deprived of general population housing without due process, the decree does not address or relate to what process may be due them before they are segregated.

Whether the Eleventh Amendment has any application at all to post-judgment proceedings is the subject of conflicting decisions of the courts of appeals. Two decisions from different circuits have recognized an Eleventh Amendment bar to enforcement of previously entered injunctive relief, including a consent decree, unless enforcement is needed to remedy a federal law violation. *Lelsz v. Kavanagh*, 807 F.2d 1243, *reh'g den.*, 815 F.2d 1034 (5th Cir.), *cert. dism'd.*, 108 S.Ct. 44 (1987); *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983). But the Second and Tenth circuits squarely disagree.

In *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989), the Second Circuit refused to accept the existence of an Eleventh Amendment bar to enforcement of a consent decree governing prison conditions. It relied extensively on *Firefighters Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986), where this Court held consent decrees executed by local officials which include remedies in excess of those authorized by statute nevertheless may be entered by the district court. The Tenth Circuit adopted this view in *Duran v. Carruthers*, 885 F.2d 1485

(10th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (U.S. 1990). But those courts may have badly misread *Cleveland*.[14]

The Fifth Circuit rejected the reading given *Cleveland* by the Second and Tenth Circuits. *Lelsz v. Kavanagh*, 807 F.2d at 1252. In turn, the Second Circuit expressly rejected the Fifth Circuit's interpretation as "illogical." *Kowzlowski v. Coughlin*, 871 F.2d at 244. The same result was reached in *Duran v. Carruthers*, 885 F.2d at 1491, where the Tenth Circuit followed *Kozlowski*.[15]

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14. First, *Cleveland* did not decide an Eleventh Amendment question; the defendants in *Cleveland* were not state officials but local officials and a municipal corporation who enjoy no Eleventh Amendment immunity. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). Second, *Cleveland* intimates nothing about whether such decrees can be enforced over the objection of even a local official defendant; the city in *Cleveland* argued in *support* of the decree. Third, since this Court in *Cleveland* found the consent decree analogous to permissible private race-conscious remedial employment agreements and therefore not implicated by Title VII's prohibition against certain race-conscious orders imposed after trial (*id. at* 516-517), it held the decree was consistent with federal law. *Id.* at 521, *and see*, 530, (O'Connor, J., *concurring*). Here, petitioners contend that the Eleventh Amendment barred the district court from enforcing the decree over their objection and that therefore those orders do violate federal law. Consequently, little about the Court's discussion of the criteria for entry of a decree can be read as a "rejection" of either petitioners' or the Fifth Circuit's Eleventh Amendment position. The Court certainly did not hold that a consent decree can be enforced over a state official's objection if its enforcement was unnecessary to "vindicate the supreme authority of federal law." *Pennhurst [etc.] v. Halderman*, 465 U.S. at 106.

15. In *Carruthers*, the consent decree not only included an express acknowledgment that the decree exceeded constitutional and other legal requirements, *id.* at 1489, but it also barred defendants from ever seeking modification which would in any way "lessen the benefits provided by the agreement ...." *Id.* at 1487. The court set forth these concessions in full before rejecting an Eleventh Amendment bar to enforcement. *Id.* at 1491. *Carruthers* thus may have

The court of appeals decision in this case, while ambiguous, appears to adopt the position of the Second and Tenth Circuits, despite the earlier *Penwell* decision. This question therefore deserves plenary consideration.

III. THE COURT OF APPEALS' AFFIRMANCE OF DECREE MODIFICATIONS WHICH EXCEED CONSTITUTIONAL REQUIREMENTS CONFLICTS WITH THIS COURT'S DECISIONS RESPECTING THE DEFERENCE DUE PRISON OFFICIALS IN OPERATIONAL MATTERS.

Prison officials are entitled to "wide ranging deference to [their] expertise . . . in deciding how to best administer their prisons." *Peterkin v. Jeffes*, 661 F.Supp. at 899, citing *Hewitt v. Helms*, 459 U.S. at 474; *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); *Whitley v. Albers*, 475 U.S. 312 (1986); *Youngberg v. Romeo*, 457 U.S. 307, 312 and n. 29 (1982). Deference is especially justified where institutional security is implicated, even where fundamental rights are allegedly infringed. *Turner v. Safley*, 482 U.S. at 89. This Court has repeatedly cautioned that "'the problems of prisons in America are complex and intractable, and, more to the point, are not readily susceptible of resolution by decree.'" *Id.* at 84, quoting *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974).

Yet when it comes to post-judgment proceedings in prison cases, these guidelines are frequently disregarded. So, for instance, in *Kowzlowski v. Coughlin*, 871 F.2d at 248, n. 8, the majority, over a vigorous dissent (*id.* at 249-250), refused to acknowledge a duty to defer to the expertise of prison officials when considering whether to

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posed difficult questions of Eleventh Amendment waiver not present here.

modify a consent decree.[16] Even assuming that an overriding concern for the finality of consent judgments justifies discarding the deference principle in determining *whether* to modify a decree (*id.* at 248, n. 8)[17], there is no reason to do so when deciding *how* to modify a decree once the need for modification is recognized.

But that is precisely what the courts below did here. As an alternative to vacating the decree, petitioners offered to substitute the East Block program for all Grade A inmates. They argued that clarifications in the law after the decree's entry and the differences between East Block and the original unit, as well as experience with the decree, operational and financial constraints, and security concerns, justified modifying the decree as they proposed. Although the court accepted the need to modify the decree for East Block, App. at 54, it substituted its own judgment for petitioners' as to which modifications to

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16. "Nor is this an instance where we must 'ordinarily defer to the[] expert judgment [of prison officials].' While these standards apply when evaluating the constitutionality of prison regulations, they play no role in determining whether changed conditions warrant modification of a consent decree." *Id.* Even if the need for "balance," *id.*, justified a close examination of the evidence offered in support of modification, it is unclear why the courts should *ignore* a prison administrator's expertise when evaluating a request for modification after having deferred to the same expertise in determining liability and entering the initial judgment. Prison officials do not become any less expert, nor courts necessarily more so, after entry of a consent decree.

17. *But see, Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. den.* 444 U.S. 1026 (1980): "An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality."

adopt. Thus, the court of appeals' summary affirmance of the disputed modifications conflicts in principle with this Court's decisions respecting the deference due the expertise of prison administrators on just such matters.

In regard, for instance, to the order to provide ping-pong tables and allow the inmates to purchase the six canteen items, the record is replete with uncontradicted expert evidence of the danger these items pose in a five-tier SHU facility. The district court ruled, however, that only actual misuse of an item by a *condemned* inmate is relevant to proving the security risk connected with that item; thus, petitioners' expert evidence of the potential for misuse was disregarded. *E.g.,* App. at 77-78. But whether a condemned inmate rather than a non-condemned inmate in a SHU had already done what the restrictions are designed to prevent, is given little weight by prison officials with the responsibility for institutional safety and security. Once it is shown or can be anticipated that SHU security can be breached with a particular item, only the irresponsible prison administrator would fail to bar access to the item by *all* SHU inmates.

Similar disregard for not only petitioners' expertise, but petitioners' responsibilities for "planning, and the commitment of resources," *Turner v. Safley,* at 85, underlies the rest of the disputed modifications, especially those that order roofed yards and shelving, which would require the expenditure of scarce funds to little beneficial purpose.[18/]

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18. The disputed modifications certainly have no basis in the Eighth Amendment. Prisoners are not entitled to shelves, or to have lunch served on the yard, to play ping-pong or to possess baby oil, shoe polish, dairy creamer, plastic spoons, toothpicks, or dental floss. *See e.g., Wright v. Rushen,* 642 F.2d at 1131. No case has ever held that inmates are entitled to a *hot* shower on the exercise yard. The inmates receive three hot showers a week indoors in East Block; since they also have hot water in their cells, this more than satisfies the Eighth Amendment. *Toussaint,* 597 F. Supp. at 1423. Nor are the inmates entitled to a roofed yard, much less an indoor gymnasium

Even if the decree did relate to a cognizable federal right, this Court has required trial courts to accept the remedial proposals offered by public officials if they adequately address a constitutional violation. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 11 and 16 (1971). An official's obligations under a decree should not be increased where its terms are sufficient to cure the violation. *Pasadena City Bd. Of Educ. v. Spangler*, 427 U.S. 424 (1976). Nor should the courts become "enmeshed in the minutiae of prison operations," since "the wide range of 'judgment-calls' that meet constitutional...requirements are confined to officials outside the Judicial Branch...." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

The courts below simply ignored these guidelines.[19] Accordingly, the rejection of petitioners' proposal conflicts

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adjacent to their cells like the North Segregation tier area. *See e.g., Peterkin v. Jeffes*, 661 F.Supp. at 911; "[i]ndoor exercise facilities...are not mandated by the Constitution." Access to tier-time is the chief distinction between the North Segregation and East Block programs. It is a distinction without a constitutional difference. Petitioners should therefore be allowed to house all the Grade A inmates in East Block, freeing North Segregation to be used for the most serious security risks.

19. Some courts of appeals appear to follow these principles in evaluating prison officials' requests to modify a consent decree under a "flexible" modification standard. *Plyler v. Evatt*, 846 F.2d 208, 212, 215 (4th Cir. 1988) (prison decree not an ordinary contract to be strictly enforced); *Newman v. Graddick*, 740 F.2d 1513, 1520-1521 (11th Cir. 1984) (decree should require no more than "constitutional alignment"); *accord, New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983) (*Swift* does not bar modifications consistent with reduced obligations found in subsequent case law). But other courts do not. *See e.g., Twelve John Does v. District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988) (emphasizing *Swift's* "new and unforeseen conditions" language); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (same). *And see, Kowzlowski v. Coughlin*, 871 F.2d at 247, where the court adopts an ill-defined "quantum of necessity" test.

with this Court's decisions respecting the limits on the jurisdiction of the federal courts to order specific changes in how state prisons are to be administered.

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH ANOTHER COURT OF APPEALS' DECISION ON WHETHER CERTAIN POST-JUDGMENT ORDERS ARE APPEALABLE.

The court of appeals' decision squarely conflicts with *Ramirez v. Rivera-Dueno,* 861 F.2d 328, 333-334 (1st Cir. 1988), where the court held that an order that the parties should negotiate and the special master should report to the court on compliance and make recommendations was not an appealable injunction under 28 U.S.C. § 1292(a)(1).

Here, petitioners challenged the expansion of the decree to East Block on the grounds they had not consented to apply it in five-tier facilities, that its expansion could not be justified as an "interpretation" in aid of the decree's purpose, and that if seen as a modification the expansion was inconsistent with the underlying law, relying, *inter alia*, on *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 501, 573-576, and n. 9. (1984). The court of appeals held petitioners had waived their objection to the decree's expansion, App. at 17, and that *Stotts* would in any event not bar the decree's "modification," *id.*, since "the interpretation of the decree...does not *conflict* with any statutory or constitutional requirement." *Id.* at 18 (emphasis added).[20/]

The two orders the court of appeals held were appealable, however, were not "final decisions" under 28 U.S.C. § 1291, *Gulfstream Aerospace Corp. v. Mayacamas*

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20. Petitioners also relied upon *Stotts* in objecting to the specific modifications ordered by the court. The court of appeals' narrow interpretation of *Stotts* conflicts with *Stotts'* disapproval of decree modifications, ordered over defendants' objection, which are "inconsistent" with the underlying law. *Id.* at 576, n. 9.

Corp., 485 U.S. 271, 275 (1988), nor were they "collateral" orders "effectively unreviewable" on appeal from a final order. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978). They also were not injunctions or, on their face, modifications of the decree so as to be appealable under 28 U.S.C. § 1292(a)(1). App. at 128. *Cf. accord, Rowland v. U.S. Dist. Court For N.D. of Cal.,* 849 F.2d 380, 382 (9th Cir. 1988). The 1982 order merely ordered negotiations. The December 1986, and January 1987, orders interpreted the decree to apply in the other facilities and ordered the Monitor to investigate compliance -- *petitioners* were not ordered to do anything. Decree interpretations, without more, are not orders "granting, continuing, modifying, refusing or dissolving injunctions,..." *Id.* The Writ should therefore issue on this question.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Writ of Certiorari should be granted.

DATED: March 13, 1991

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